IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

TUESDAY, THE 24TH JULY 2007 / 2ND SRAVANA 1929

WP(C).No. 19820 of 2007(H)

AGAINST THE ORDER DATED 08/06/2007 IN IA.1158 & 1206/2005 IN OS.109/2005 of MUN-MAGI COURT, PARAVOOR

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PETITIONER:

SUSEELA VIJAYAN, W/O. VIJAYAN,
AGED 52 YEARS,RESIDING AT SANJAY BHAVAN,
NEDUNGOLAM CHERRY, PARAVOOR VILLAGE, KOLLAM.

BY ADV. SRI.C.UNNIKRISHNAN (KOLLAM)
SRI.S.HARIKRISHNAN

RESPONDENT:

BHAGAVATH SINGH, S/O.K.GANGADHARAN,
AGED 43 YEARS, ISWARYA, NEDUNGOLAM CHERRY,
PARAVOOR, NOW RESIDING AT 'SAROJ GANGA',
PARAVOOR, KOLLAM.

BY ADV. SRI.G.BHAGAVAT SINGH (PARTY-IN-PERSON)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 24/07/2007, ALONG WITH WPC NO. 21099 OF 2007 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF THE COMMISSION REPORT DTD. 27.07.98 AND THE SKETCH OF THE PROPERTY.

EXT.P2: COPY OF THE PETITION IN I.A.NO.1158/05.

EXT.P3: COPY OF THE PETITION IN I.A.1206/05 IN O.S.NO.109/05.

EXT.P4: COPY OF THE ORDER IN I.A.NO.1158/05 IN O.S.109/05 DTD. 8.6.2007.

EXT.P5: COPY OF THE ORDER IN I.A.NO.1206/05 IN O.S.109/05 DTD. 8.6.2007.

RESPONDENT'S EXHIBITS:

EXT.R1(a): COPY OF THE TP ACCOUNTS OF THE PETITIONER AS WELL AS HER HUSBAND AND OTHER PROCEEDINGS AND DOCUMENTS ISSUED BY THE TAHSILDAR, KOLLAM ON THE BASIS OF THE COURT CERTIFICATE WITH A COVERING LETTER DTD. 31.7.1999.

EXT.R1(b): COPY OF THE FIELD MAP OF SY.NO.387 IN BLOCK NO.32 OF PARAVOOR VILLAGE.

EXT.R1(c): COPY OF THE COUNTER AFFIDAVIT FILED BY THE PETITIONER AND HER FAMILY MEMBERS IN O.S.NO.84/1996 DTD. 09/.07.1997.

EXT.R1(d): COPY OF THE COMMISSION REPORT FILED BY ADVOCATE COMMISSIONER A.R.SAJU, DTD. 21.02.2005.

EXT.R1(e): COPY OF THE MARTGAGE DEED NO.3256/2003 EXECUTED BY THE PETITIONER AND HER HUSBAND IN FAVOUR OF S.N.V.R.C. BANK, PARAVOOR ON 19.9.2003.

EXT.R1(f): COPY OF THE PLAINT SCHEDULE FILED BY THE PETITIONER IN O.S.NO. 109/05 DTD. 13.4.2005.

EXT.R1(g): COPY OF THE ORDER NO. K.DIS. 10424/2000/C6 DTD. 18.5.2000 PASSED BY THE TAHSILDAR, KOLLAM AS PER THE DIRECTION OF THIS HON'BLE COURT.

EXT.R1(h): COPY OF THE TAX RECEIPT ISSUED BY THE VILLAGE OFFICER AFTER EFFECTING MUTATION DTD. 23.6.2000.

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// TRUE COPY //

M.N.KRISHNAN, J

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W.P.(C)Nos. 19820 & 21099 OF 2007

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Dated this the 24th day of July, 2007

JUDGMENT

Writ petition, W.P.(C)No.19820 of 2007 is filed against the order of the learned Munsiff in I.A.No.1158 of 2005 in O.S.No.109 of 2005 whereby the learned Munsiff has refused the prayer for amendment of the plaint embodied in paragraph 5. There is also a prayer in the same writ petition that the court below went wrong in refusing to issue a fresh Commission as per the prayer of the plaintiff. The other writ petition is filed challenging the orders of the court in partially allowing the prayers made by the plaintiff. Suit O.S.No.109 of 2005 is filed by the plaintiff before the Munsiff's Court, Paravur for an injunction with respect to 13 cents of property comprised in Sy.No.387/28. The contesting defendants would contend that the plaintiff does not have any title or possession over 13 cents of property claimed in Sy.No.387/28. Their contention is that the plaintiff has obtained right and possession over the property comprised in Sy.No.387/27-2 and not in Sy No.387/28 at all. The plaintiff is claiming right over the property by virtue of the document of the year 1989 and in the said document the survey

number of the property is shown as 88B having a total extent of 66 cents out of which 13 cents is assigned in favour of the plaintiff. I am informed that the defendants had also instituted a suit with respect to the right over 25.5 ares of property. Now the dispute between the parties can be resolved only by finding out the properties, i.e. assigned. If the property assigned in favour of the plaintiff in the case is not in Sy.No.387/28 then the plaintiff will not be entitled to get any relief. It is the settled principle that the properties can be identified not only by survey numbers but by description, measurements and boundaries and the factor which is with least error is to be accepted by the court in arriving at a decision on the point. This is the settled position of law. Now the plaintiff asserts that the property obtained by her under 1989 document is comprised in Sy.No.387/28. The plaintiff has to substantiate to the satisfaction of the court that what she had obtained under the document is the property comprised in Sy.No.387/28 unless and until he successfully establishes the same she will be out of court. From the written statement and the contentions raised, it is very clear that the defendants do not admit any right or possession over 13 cents of property covered by Sy.No.387/28. There is a dispute regarding the right of the property claimed by the plaintiff and now the prayer sought for declaration is that she is entitled to that property in law by virtue of the document

claimed by her in the year 1989. Whether the plaintiff is entitled to get such a declaratory decree or not is a matter that can be gone into and decided by the court only after adducing evidence. But the plaintiff is legally entitled to request the court for a declaration when a cloud of suspicion is thrown around her title and therefore one cannot attribute blame on the plaintiff for seeking a declaratory relief.

2. Therefore it is a matter to be adjudicated and decided upon by the court. At the stage of amendment, the court is not expected to go into the evidence to find out a prima facie case of the party. Therefore I find that the learned Munsiff has erred in refusing to allow the prayer for amendment with respect to the same. That requires interference.

3. So far as the application for issuance of a new Commission is concerned, it is submitted before me by both sides that the application for setting aside the Commissioner's plan and report is pending before the court below and the present plaintiff moved an application for issuance of a fresh Commission at that stage. This court has taken the view that under ordinary circumstances, an application to set aside the Commissioner's plan and report has to be disposed of before issuance of a fresh Commission or in other words, large number of Commissions cannot be issued in the case for reporting the fact that it will lead to confusion and the court will not be able

to decide.

4. Therefore the approach made by the court below in disallowing the issuance of a fresh Commission is valid in law and that order is confirmed. But, it is made clear that the identification of the property is necessary with respect to the title deeds and if the application for setting aside the Commissioner's plan and report is allowed, the court shall issue a fresh Commission depending upon the decision it may arrive at after hearing both the parties.

Therefore the writ petition is disposed of and the amendment application which is refused by the court below is allowed and the other order refusing to issue a new Commission is confirmed.

Writ petitions are disposed of as above.

M.N.KRISHNAN, JUDGE

Cdp/-